NO. 80-2051

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIDELITY UNION TRUST COMPANY, a banking corporation of the State of New Jersey, AS TRUSTEE UNDER THE GENERAL BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 8, 1953, AS SUPPLEMENTED; FIRST NATIONAL STATE BANK OF NEW JERSEY, a national banking association, AS TRUSTEE UNDER THE JUNIOR BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 7, 1962, AS SUPPLEMENTED,

Plaintiffs-Appellants,

v.

NEW JERSEY HIGHWAY AUTHORITY, a body corporate and politic created and existing under and by virtue of Chapter 16 of the laws of 1952, as amended and supplemented, and JAMES R. ZAZZALI, Attorney General of the State of New Jersey,

Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE JAMES R. ZAZZALI, ATTORNEY GENERAL OF NEW JERSEY, TO DISMISS OR TO AFFIRM

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TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT—The appeal should be dismissed or the State Supreme Court judgment affirmed because appellants fail to raise a substantial federal issue, the case presents no issue of broad importance or conflict with federal precedent and the determination that the State legislative action did not unconstitutionally impair the contractual rights of the bondholders was plainly correct	7
CONCLUSION	11

Cases Cited

Allied Structural Steel Co. v. Spannus, 438 U.S. 234 (1978)	7, 11
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)	7, 11

Statutes Cited

L. 1973, Ch. 370	8, 10
New Jersey Highway Authority Act	2, 3, 5, 11
N.J.S.A. 27:12B-2	2
N.J.S.A. 27:12B-3(a)	2
N.J.S.A. 27:12B-4	2, 9, 10
N.J.S.A. 27:12B-5(i)	2

PAGE

N.J.S.A. 27:12B-9(a)(i) 2

N.J.S.A. 27:12B-9(a)(viii) 3

N.J.S.A. 27:12B-11 3

N.J.S.A. 27:12B-14 ..... 3, 9

28 U.S.C.:

Sec. 1257(2) 4

Rules Cited

Rule 16(1)(b) 2

Rule 16(1)(d) 2

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Appellee James R. Zazzali, the Attorney General of New Jersey, respectfully moves pursuant to Rule 16(1)(b) to dismiss this appeal or affirm the judgment of the Supreme Court of New Jersey on the ground that it does not present a substantial federal question and pursuant to Rule 16(1)(d) on the grounds that the case does not raise any issues of special importance, does not conflict with federal precedent and is so obviously correct as to warrant no further review by this Court.

Counter-Statement of the Case

In 1952, the Legislature recognized the pressing need of ensuring continued highway expansion and safety through the modernization and maintenance of state roadways, and, as a result, promulgated the New Jersey Highway Authority Act ("Act"). The Act established the New Jersey Highway Authority ("Authority"), or if "said authority shall be abolished, an authority defined as the board, body or commission succeeding to the principal functions thereof or to whom the powers given by the Act to the Authority shall be given by law." N.J.S.A. 27:12B-3(a). The Authority was entrusted with the crucial duty of constructing and operating roadways that presently serve as the vital link between various parts of the State. N.J.S.A. 27:12B-2. As expressed by the Legislature, "the exercise by the Authority of the powers conferred by the Act in the construction, operation, and maintenance of projects shall be deemed and held to be an essential governmental function of the State." N.J.S.A. 27:12B-4.

As a means of financing individual projects, the Act allowed the Authority to fix, revise and collect tolls, N.J.S.A. 27:12B-5(i), and to issue bonds or notes to be secured by a pledge of all or any part of its tolls or revenues, N.J.S.A. 27:12B-9(a)(i). It was also authorized to include a cove-

nant with respect to the toll rates "to be established and charged" in a contract with the proposed security holders. N.J.S.A. 27:12B-9(a)(viii).

To encourage public investment, the Act guaranteed adequate investment return, with interest computed at a fixed periodic rate. The Act allayed investor concern with State interference and possible reallocation of revenues for purposes other than fulfilling State obligations to bondholders, by pledging that the State would not restrict the rights vested in the Authority "to establish and collect such tolls or other charges as may be convenient or necessary to produce sufficient revenues to meet the expenses of maintenance and operation . . . and to fulfill the terms of any agreements made with the holders of bonds or notes authorized by this act or in any way impair the rights or remedies of the holders . . ." N.J.S.A. 27:12B-11. The goal of securing bondholder investment was further enhanced by the Act. The tolls and charges were to be fixed so "as to effectuate the purposes of [the] act and in any event to carry out and perform the terms and provisions of any contract with or for the benefit of holders of bonds or notes. Such tolls and charges [were not to] be subject to supervision or regulation by any other commission, board, bureau or agency of the State. . . ." N.J.S.A. 27:12B-14.

In 1974, the Legislature amended the Act. It is this amendment that is the subject of this appeal. The amendment did not alter the security provisions outlined above. The bondholders' financial guarantees from the State remained intact. The amendment simply provided that:

> No resolution or other action of the authority providing for the issuance of bonds, refunding bonds or other obligations or for the fixing, revising or adjusting of tolls for the use of any highway proj-

ects or parts or sections thereof shall be adopted or otherwise made effective by the authority without the prior approval in writing of the Governor and at least one of the following: The State Treasurer and the Comptroller of the Treasury. The powers conferred in this section upon the Governor, the State Treasurer and the Comptroller of the Treasury shall be exercised with due regard for the rights of the holders of bonds of the authority at any time outstanding, and *nothing in, or done pursuant to, this section shall in any way limit, restrict or alter the obligation or powers of the authority or any representative or officer of the authority to carry out and perform in every detail each and every covenant, agreement or contract at any time made or entered into by or on behalf of the authority with respect to its bonds or for the benefit, protection or security of the holders thereof.*

A true copy of the minutes of every meeting of the authority shall be forthwith delivered by and under the certification of the secretary thereof, to the Governor. No action taken at such meeting by the authority shall have force or effect until 10 days (Saturdays, Sundays and holidays excepted) after such copy of the minutes shall have been delivered or the approval thereof by the Governor prior thereto. If, in said 10 day period, the Governor returns such copy of the minutes with veto of any action, except action to negotiate or execute a collective negotiation agreement with a certified public employee organization representing employees of the authority, taken by the authority or any member thereof at such meeting, such action shall be null and of no effect. (emphasis added). New Jersey Laws 1973, c. 370, amending N.J.S.A. 27:12B-4.

Though the amendment expressly directs the Governor to exercise his duties thereunder in complete accordance with the guaranteed financial security of the bondholders, the appellants instituted a declaratory judgment action claiming, pertinent hereto, that the amendment was an unconstitutional violation of the Contract Clause. The New Jersey Superior Court, Chancery Division, granted summary judgment to plaintiffs, 164 N.J. Super. 246 (Ch. Div. 1978) (Aa26 to 72).*

On appellees' motion, the New Jersey Supreme Court granted direct certification. 82 N.J. 282 (1979). After reviewing the statutory amendment and discovering no impairment of the Act's security provisions sufficiently adequate, in light of recent decisions of this Court, to justify declaring the amendment unconstitutional, the court reversed the Chancery Division and held that the amendment did not violate either the United States or New Jersey Constitution. 85 N.J. 277, —— A.2d —— (1981) (Aa1 to 25). In particular, the court initially identified the terms of the agreement between the Authority and the bondholders as constituted by bond resolutions and the Act and found that the bond purchasers knew the Authority's composition, size or even existence was never a term of their agreement with the Authority (Aa12-13). In fact, appellants so conceded at oral argument before the Supreme Court of New Jersey (Aa14). The challenged amendment was found to consist of nothing more than a change in the structure of the governance of the Authority and, thus, did not involve a financial condition of the agreement. As the court noted, none of the requirements for the financial security of the bondholders was diminished by the 1973

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* As used herein Aa refers to the appendix filed by appellants with their Jurisdictional Statement.

amendment; in fact, precisely the same obligation to protect the bondholders' rights was imposed upon the Governor and the State Treasurer or Comptroller as had originally been imposed upon the Authority members. N.J.S.A. 27: 12B-4 (Aa17 to 18).

Next the court determined that even if the amendment could be considered to modify the financial terms of the bondholders' agreement, the modification was at most insubstantial (Aa21).* Appellants demonstrated no adverse impact arising from the 1973 amendment, with the only affidavits in the record reflecting no effect upon the market value of the bonds (Aa21). In this respect, the court found the 10 days afforded the Governor to approve or disapprove the Authority's action inconsequential (Aa22). Further, the court concluded that the State could and did properly exercise its authority to change the structure governing a public entity (Aa23-24). Thus, since the financial terms of the agreement between the bondholders and the Authority were not impaired by the agreement and even if there had been some impairment it was insubstantial and since, in any event the amendment was a proper exercise of State power, the lower court's decision was reversed and the constitutional assertions of appellants rejected.

On April 30, 1981, appellants filed a Notice of Appeal with this Court pursuant to 28 U.S.C. §1257(2). Thereafter they filed a Jurisdictional Statement and this motion followed.

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* Page 26 of the court's slip opinion which contains the phrase "it is at most insubstantial" is incorrectly reproduced in appellants' appendix at page 21a as "it is at most substantial."

ARGUMENT

The appeal should be dismissed or the State Supreme Court judgment affirmed because appellants fail to raise a substantial federal issue, the case presents no issue of broad importance or conflict with federal precedent and the determination that the State legislative action did not unconstitutionally impair the contractual rights of the bondholders was plainly correct.

This case does not present a substantial federal constitutional issue. The State Supreme Court decision fully follows the standards governing a Contract Clause challenge as recently rearticulated by this Court. The decision, moreover, grounded in the peculiar facts pertinent hereto raises no issues of broad importance, neither does it conflict with any federal precedent. Finally, the rejection of appellants' constitutional challenge was plainly correct.

With limited exception, the enactment of State legislation that totally eliminates an important security provision, substantially impairs the contractual relationship or severely disrupts contractual expectations, violates the Contract Clause. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel Co.* v. *Spannus*, 438 U.S. 234 (1978). As noted, however, by the Supreme Court of New Jersey, states retain their broad police powers which may affect contracts so long as the exercise thereof serves a legitimate public purpose and the adjustment of contractual duties and obligations is reasonable. *Id.* 241; *United States Trust Co.* v. *New Jersey, supra*, 431 U.S. at 22-24. Thus, in considering whether there has been a violation of the Contract Clause the terms of the financial agreement between the parties must be ascer-

tained and it must be determined whether there was an impairment thereof and, if so, to what extent. It must further be determined whether the impairment, if any, was the result of proper exercise of state power. It is plain that evaluating the particular facts of this case in light of these criteria the Supreme Court of New Jersey properly found that the 1973 amendment complained of by appellants did not violate the Contract Clause.

As initially noted by the court, the terms of the agreement between the bondholders and the Authority provided no vested rights in the particular form of the Authority. What the bondholders obtained from the State was a promise to pay interest or principal when due and a promise to maintain adequate security or remedies to insure the timely performance of the primary obligation. The 1973 amendment affected no change or threat to this right of financial security. The only effect of chapter 370 was to take certain powers previously possessed solely by the Authority and to bestow those powers jointly upon the Authority, the Governor and Treasury officials. Chapter 370 makes it unmistakably clear that the Governor and Treasury officials are subject to precisely the same obligations as are members of the Authority with respect to protection of the rights of the Authority's bondholders. It is of course theoretically possible that an improperly motivated Governor or Treasury official could veto decisions of the Authority which were necessary to safeguard the financial interests of bondholders. It is equally possible, however, that the powers under chapter 370 of the Governor or Treasury official could be employed to thwart a proposed course of action which would be inimical to the bondholders. In any event, the controlling circumstance is that bondholders retain the same remedies under chapter 370 as heretofore for enforcement of their rights under outstanding bonds.

Even assuming *arguendo* that a change in allocation of responsibility for governing a public entity could be deemed to impair contractual relations, the Supreme Court of New Jersey plainly correctly found that appellants failed to demonstrate any adverse impact upon the security of the Highway Authority bonds. The 1973 amendment to N.J.S.A. 27:12B-4 declares that the Governor and either the State Treasurer or the Comptroller of the Treasury must approve all toll adjustments by or bond resolutions of the Highway Authority prior to those acts becoming effective. The Legislature, however, was assiduous in taking care that such power be conferred with clearly ascertainable standards for its exercise. The amendment states:

> "No resolution or other action by the authority providing for the issuance of bonds, refunding bonds or other obligations or for the fixing, revising or adjusting of tolls for the use of any highway projects or parts or sections thereof shall be adopted or otherwise made effective by the authority without the prior approval in writing of the Governor and at least one of the following: The State Treasurer and the Comptroller of the Treasury. *The powers conferred in this section upon the Governor, the State Treasurer and the Comptroller of the Treasury shall be exercised with due regard for the rights of the holders of bonds of the authority at any time outstanding, and nothing in, or done pursuant to this section shall in any way limit, restrict or alter the obligation or powers of the authority or any representative or officer of the authority to carry out and perform in every detail each and every covenant, agreement or contract at any time made or entered into by or on behalf of the authority with respect to its bonds or for the benefit, protection or security of the holders thereof.*" (emphasis added). N.J.S.A. 27:12B-4.

Accordingly, the Governor has been instructed to consider the rights of any Parkway bondholders arising from their covenants or agreement with the Authority, before consenting to or rejecting any change in the toll structure or the amount of bonded indebtedness.

A Parkway bondholder is entitled to prompt payment of interest on his investment and the return on his principal. The principal guarantee for the dutiful performance of these obligations is defined, treated and implemented in the General Bond Resolution, the Junior Bond Resolution and the supplemental bond resolutions. In an express covenant, the Highway Authority has promised the bondholders that a toll and other charges will be imposed to insure income well in excess of the annual operational items (i.e., expenses, reserves, working capital) and debt service (i.e., interest and principal). Specifically, Section 711 of the various bond resolutions mandates the collection of tolls and charges so as to produce annual net income equal to at least the annual aggregate amount of interest and principal due and payable to bondholders.

Chapter 370 of the Laws of 1973 maintains these safeguards by explicitly protecting any right to a specific level of toll income which accrued to the Parkway bondholders by reason of their covenant, agreement or contract with the Highway Authority. The self-executing clause of the amendment to N.J.S.A. 27:12B-4 prevents any diminution or curtailment of the obligation to establish a toll rate in conformity with Section 711. Therefore, the amendment amounts to an equivalent security provision which impinges upon no substantial right of the bondholders. This conclusion is firmly supported by the fact that the only evidence presented below on the subject of value of Parkway bonds before and after adoption of the amendment indicated a stable market in those securities.

Appellants' bald assertion, therefore, that the decision of the Supreme Court of New Jersey in this case is in direct contravention with this Court's decisions in *United States Trust Co.* and *Allied Structural Steel Co.* is misplaced. Further, the assertion that the 1973 amendment infringes upon security provisions of the Act which are an integral part of the terms of the agreement between the bondholders and the Authority is drawn from whole cloth. The financial terms of the agreement are not affected at all, much less significantly so. The amendment, moreover, represents a valid exercise of State authority over governmental organization. Plainly this case does not present a substantial federal question. It does not present an issue of broad importance or a conflict with federal precedent and, finally, the judgment below is clearly correct. Accordingly, the appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed.

Respectfully submitted,

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